United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1149

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Docket 74-1149

A/S CUSTODIA,

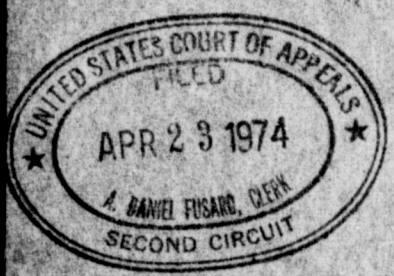
Petitioner-Appellant,

—against—

LESSIN INTERNATIONAL, INC.,

Respondent-Appellee.

BRIEF OF RESPONDENT-APPELLEE



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Issues Presented

Did Judge Ward reversibly err in finding that "the parties do not appear to have entered into 'a written agreement for arbitration'" as required to compel arbitration under 9 U.S.C. §4? (51a).

Did Judge Ward reversibly err in finding that "upon the record presented to the Court, petitioner has not demonstrated that it is entitled to a trial on the issue of whether the parties had entered into 'a written agreement for arbitration,' as required by 9 U.S.C. §4?" (61a).

Statement of the Case

Proceedings Below

By a petition filed October 5, 1973, and subsequent motion returnable October 23, 1973, A/S CUSTODIA, Owner of the M/V FERNGROVE ("petitioner"), applied to Judge Ward of the Southern District Court for an order pursuant to Sections 4, 5, and 6 of the Federal Arbitration Act (9 U.S.C. §§4, 5, and 6), directing Lessin International, Inc., as charterer ("respondent"), to proceed to arbitration of petitioner's claim for damages in accordance with the arbitration clause of a charter party claimed to have been entered into on June 29, 1973 (3a, 15a).

Respondent having unequivocally denied making any "written agreement for arbitration" with petitioner, petitioner replied with an affidavit of one Haakon Steckmest ("Steckmest"), a "Chartering Broker Trainee," employed by J. H. Winchester & Co. ("Winchester"), who set forth his version of negotiations had with Ocean Freighting & Brokerage Corporation ("Ocean Freighting"), as "Charterers' brokers" (31a). Upon due consideration thereof and the briefs of counsel, Judge Ward found that "the parties do not appear to have entered into a written agreement for arbitration * * * as required by the United States Arbitration Act, 9 U.S.C. §4," and so dismissed the petition in a memorandum opinion and order filed November 15, 1973 (51a).

Subsequently, petitioner moved for reargument but without submitting any additional factual material.* In its sup-

* Although petitioner's notice of motion for reargument refers to an "annexed affidavit verified on the 21st day of November, 1973" (52a), none was in fact annexed.

porting brief petitioner urged, on the basis of this Court's decision in *Interocean Shipping Co.* v. *National Shipping and Trading Corp.*, 462 F.2d 673 (2d Cir. 1972), that it was alternatively entitled to a trial on the issue of whether the parties had entered into "a written agreement for arbitration" as required by 9 U.S.C. §4. This request was rejected by Judge Ward who, in an opinion and order dated December 21, 1973, found:

> "In order to determine whether there is a triable issue, it is necessary to examine the record. Upon the record presented to the Court, petitioner has not demonstrated that it is entitled to a trial on the issue of whether the parties had entered into 'a written agreement for arbitration' as required by 9 U.S.C. §4. All that existed was an *oral* agreement reached through the respective brokers for the parties and a *proposed* written Charter Party agreement which was never executed by respondent. This is made abundantly clear by the affidavit of Haakon Steckmest submitted on behalf of petitioner and by Exhibit 'B' attached thereto. Unlike *Interocean Shipping Co.* v. *National Shipping and Trading Corp., supra,* no written fixture was entered into in the instant case.
>
> "Under the circumstances set forth, the petitioner is not entitled to a trial. The motion is, therefore, denied without costs" (61a).

A formal judgment dismissing the petition having been entered on January 3, 1974 (62a), the petitioner, on January 21, 1974, filed its notice of appeal therefrom and from the previous orders of the Court.

Facts

For purposes of this appeal we accept, as did the District Court, petitioner's version of the facts as set out in Steckmest's affidavit except on matters where his averments obviously extend beyond his personal knowledge and testimonial competence. In making this exception we have reference specifically to Steckmest's assertion in paragraph 5 of his affidavit that "the terms of this contract were agreed to by * * * the Charterers, Messrs. Lessin International, Inc. * * *" (31a)—a matter plainly beyond Steckmest's personal knowledge and a conclusion, at best.

Steckmest's account of the negotiations follows.

In early June a scrap cargo from Tampa to Taiwan was "quoted" by Ocean Freighting to Steckmest, a Chartering Broker Trainee in the employ of Winchester. "This business" was circulated to Winchester's cable correspondents, with result that about two weeks later, on June 20th, Steckmest received "an offer on this business" from Messrs. Fearnley & Eger's Befraktningsforretning A/S,* Oslo, Norway, of the M/S FERNGROVE. This offer was conveyed to Ocean Freighting which, on the same day, made a counteroffer on behalf of respondent.

At some subsequent unspecified point in time "when the terms of this contract were agreed to by the Owners and (so the affidavit avers) the Charterers, Messrs. Lessin International, Inc.," Ocean Freighting prepared a form of charter party (31a, par. 4). On June 25, 1973 this document was forwarded to Steckmest with a letter requesting that "you kindly have the Owners sign the original or

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* Evidently, a Norwegian charter brokerage firm.

alternatively sign on their behalf" and return it for signature by the respondent (Exhibit B to Steckmest affidavit, 42a).

"After having obtained authority from the Owners," Winchester signed the document on behalf of the Owners and returned it to Ocean Freighting for execution by respondent (32a, par. 6).

Later Steckmest was advised by Ocean Freighting that respondent was unable to obtain the scrap cargo and refused to sign the document (32a, par. 7).

ARGUMENT

POINT I

The District Court correctly found that the parties do not appear to have entered into "a written agreement for arbitration" as required by 9 U.S.C. §4.

A section 4 proceeding is in essence an action for specific performance of the arbitration agreement sued on. *Marine Transit Corp.* v. *Dreyfus,* 284 U.S. 263, 278 (1932). In order to be so specifically enforceable the agreement in question is statutorily required to be "a written agreement for arbitration" and, therefore, in an effort to persuade the District Court that this requirement was met in the present case, the petitioner submitted the affidavit of Steckmest (31a). Steckmest's account of the transaction not only fell short of satisfying the statutory requirement but disclosed that no "written agreement for arbitration" was made by the parties. Hence Judge Ward had no choice but to so find and dismiss the petition as he did in his memorandum decision of November 15, 1973 (51a).

At minimum, his findings in that decision and subsequent decision on reargument (60a-61a) cannot properly be claimed by petitioner to be "clearly erroneous" and subject to being set aside by this Court.

In this connection it may be noted that although the District Court's dismissal of the petition to compel arbitration under section 4 is deemed a final order and appealable under 28 U.S.C. §1291, this Court's affirmance will not put an end to the petitioner's claim for damages for breach of contract. Petitioner remains free to litigate its claim on the oral fixture which under maritime law is, if proved, a binding charter contract. *American Hawaiian S.S. Co.* v. *Willfuehr,* 274 Fed. 214 (D.C. Md. 1921), aff'd sub nom. *United States Fidelity & Guaranty Co.* v. *American-Hawaiian S.S. Co.,* 280 Fed. 1023 (4th Cir. 1922); *Northern Star S.S. Co.* v. *Kansas Milling Co.,* 75 F. Supp. 534 (S.D. N.Y. 1947); and cases cited by petitioner below in footnote at 45a. Indeed, petitioner is already pursuing its claim for breach of contract in an admiralty action filed in the Southern District of New York under docket no. 74 Civ. 376 JMC. Parenthetically, it is understood that the pendency of such admiralty action does not affect this Court's jurisdiction over the present appeal by rendering the District Court's dismissal of this independent proceeding to compel arbitration non-final and non-appealable, notwithstanding the settled rule that a district court's refusal to stay an existing admiralty suit pending arbitration pursuant to 9 U.S.C. §3 is not final and not appealable. *Penoro* v. *Rederi A/B Disa,* 376 F.2d 125 (2d Cir. 1967), cert. den., 389 U.S. 852 (1967); *Carcich* v. *Rederi A/B Nordie,* 389 F.2d 692, 694-5 (2d Cir. 1968).

A. *Authorities*

As support for his original decision, Judge Ward cited *Garnac Grain Company, Inc.* v. *Nimpex International, Inc.*, 249 F. Supp. 986 (S.D.N.Y. 1964), a decision by Judge Metzner. That petitioner's statement of facts, which the court took to be true, showed that the parties' brokers concluded an oral fixture on the understanding that a standard form of charter party with an arbitration clause was to be used. The written charter party was then prepared in accordance with the oral fixture and transmitted to the respondent's broker for signature by respondent who, however, did not sign it and refused to perform the oral charter agreement. In these circumstances Judge Metzner held that inasmuch as "the parties never entered into 'a written agreement for arbitration * * *' as required by section 4," and "a written agreement for arbitration is the sine qua non of an enforceable arbitration agreement, Fisser v. International Bank, 282 F.2d 231 (2d Cir. 1960)," arbitration could not be compelled. In other words, although the oral fixture would constitute a binding maritime contract, the Court accepted that an oral contract cannot be tortured into "a written agreement for arbitration" as required to compel arbitration under 9 U.S.C. §4.

Contrary to petitioner's stated but unexplained "position in this case that the *Garnac* decision is erroneous" (Petitioner's Brief, p. 7), the decision is squarely in accord with the decisions of this Court (including, *Fisser, supra,* cited by Judge Metzner) and firmly supported Judge Ward's decision here. There was no fixture letter signed by either broker here; and, notably, Steckmest confirmed that only "*after* having obtained authority from the Owners" did Winchester execute "the written agreement on

behalf of Owners" and return it to Ocean Freighting for signature by respondent (emphasis added, 32a, par. 6).

Petitioner's quoted excerpts from *Fisser, supra* (Brief, pp. 4-5), may be of academic interest but nothing more as they do not touch upon any point involved here. In that case there was a written charter party with an arbitration clause signed by the libelants and Allied and the issue was whether International Bank was bound thereby on the ground that Allied was its *alter ego*. Petitioner's heavy emphasis of the *Fisser* opinion's "footnote 4" on the requirements of former N.Y.C.P.A. §1449 for a "submission to arbitrate *an existing controversy*" (Petitioner's Brief, p. 5) is pointless. It is of no significance in the instant case but may be noted parenthetically that the remainder of "footnote 4" in *Fisser* shows that C.P.A. §1449 did not differ from the Federal Arbitration Act in defining the requirements for an enforceable contract to arbitrate a future controversy (282 F.2d 231, at 233).

Equally inapposite are the remarks of Judge Ryan about telexes, etc., excerpted by petitioner (Brief, p. 5) from his unreported opinion on remand of *Interocean Shipping Company* v. *National Shipping & Trading Corporation, et al.*, 71 Civ. 3363 (S.D.N.Y. Feb. 28, 1974), remanded, 462 F.2d 673 (2d Cir. 1972). In the instant case we are not concerned with any question whether a telex or telegram may satisfy the requirements of a statute of frauds.

More closely in point is petitioner's reference to *Interocean Shipping Co., supra,* at page 6 of its brief, but its description of Judge Ryan's holding and what he cited *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942), and *Fisser, supra,* to support, is not entirely accurate or factual.

Judge Ryan stated:

> "It is clear that, if the fixture letter contained all the necessary elements on which the parties had agreed and if De Salvo, who signed it, had authority on behalf of both parties, a binding contract came into effect at that time and it was not necessary that the parties execute a formal charter-party to be bound to all its terms including arbitration. *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978 (C.A. 2, 1942); *Fisser* v. *International Bank*, 282 F.2d 231 (C.A. 2, 1960)" [slip opinion, p. 12].

Since elsewhere Judge Ryan found that the broker De Salvo, chief executive of Poten & Partners, Inc., who signed the fixture letter or fixture note, was *the agent for both parties* and the other "ifs" in his above-quoted statement were likewise satisfied, he inevitably held that the owner and charterer were mutually bound by the fixture letter, as a binding contract, including the arbitration provision of the standard charter ("Mobiltime") referred to therein. Thus the court simply applied the principle recognized by Judge Metzner in *Garnac, supra,* and by Judge Ward in this case, that a written fixture making reference to a standard charter containing an arbitration clause may be enforced as "a written agreement for arbitration" under 9 U.S.C. §4.

In contrast, as Judge Ward pointed out on reargument:

> "* * * Unlike *Interocean Shipping Co.* v. *National Shipping and Trading Corp., supra,* no written fixture was entered into in the instant case" (61a).

POINT II

The District Court correctly found that petitioner had not shown a triable issue of whether the parties had entered into "a written agreement for arbitration" as required by 9 U.S.C. §4.

Nothing new was presented to Judge Ward by petitioner on its application for reargument except a reference to this Court's decision in *Interocean Shipping Co., supra,* 462 F.2d 673, which petitioner had failed to call to the Court's attention before. Petitioner had put its best foot forward in the affidavit of Steckmest who, however, actually negated the existence of "a written agreement for arbitration." Consequently, Judge Ward ruled that there was no need or justification for granting petitioner a trial of an issue which did not exist or which petitioner had not demonstrated to exist (61a). This ruling was entirely sound, being in accord with the analogous summary judgment rule that "a defendant should not be compelled to go through a full dress trial with its substantial expense where plaintiff has failed to offer probative evidence tending to support his claim." *Krisel* v. *Duran,* 303 F. Supp. 573, 579 (S.D.N.Y. 1969), aff'd on opinion below, 424 F.2d 1367 (2d Cir. 1970).

Petitioner's brief is full of assertions to effect that the "Charterer" or respondent or its attorneys "has not denied" various allegations or statements made by petitioner or its broker, "has failed to present any evidence to refute petitioner's allegations," etc. (Brief, pp. 8-9). These assertions are wide of the mark. Originally, under the petition to compel there might have been an issue whether

there was "a written agreement for arbitration" but once petitioner itself demonstrated the absence of any such written agreement, there was no occasion for respondent to deny or refute anything in this proceeding which was, or should have been, at an end. Respondent will meet petitioner's claim on the merits in its pending admiralty action.

Finally, petitioner urges that it should be granted a trial to present evidence on whether the facts bring this case within Section 206 of the Federal Arbitration Act which, according to petitioner, "merely requires an agreement and does not require a writing—signed or unsigned" (Petitioner's Brief, p. 10). This novel request, not made below, is specious. Section 206, 9 U.S.C. §206, is in Chapter 2 of Title 9 (9 U.S.C. §§201-208). Chapter 2 was enacted in 1970, 84 Stat. 692, to implement and provide for enforcement in United States Courts of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, as ratified by the Senate in 1968, 114 Cong. Rec. 29605 (1968). Article II of the treaty (TIAS 6997, 21 UST 2517, published in note to 9 U.S.C. §201) specifically restricts an enforceable arbitration agreement to an "agreement in writing" as defined in paragraph 2 of that article. Whether the Convention or implementing statute may ever be used by our courts to enforce an arbitration agreement claimed to have been made in New York for arbitration here seems at best doubtful. But certain it is that the implementing statute does not elevate to enforceable status any arbitration agreement claimed to have been made in or by an oral fixture.

CONCLUSION

The judgment of the District Court should be affirmed with costs.

Dated: New York, New York
April 23, 1974

Respectfully submitted,

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